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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-783

BERT REECE,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Bert Reece, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case June 8, 1978.

OPINION BELOW

The opinion and decision for the Court of Appeals for the Ninth Circuit affirming the Judgment rendered by the United States District Court for the District of Montana, Billings,

division, is set forth in the Appendix, infra, at pp. 1a - a. The Order denying the petition for rehearing is set forth in Appendix, infra, p. 1b.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 8, 1978, and the Petition for Rehearing was denied on August 28, 1978. This Court has jurisdiction pursuant to Title 28 USC Section 1254(1).

QUESTIONS PRESENTED

1. Should the trial court have granted the defendant's motion to quash the testimonial evidence for the reason the IRS agents were not legally engaged in their official duties at the time of the incident?

2. Must a conviction under 26 U.S.C. §7212(a) require a finding that a true threat was made?

3. Does the absence of the requirement of a finding that a true threat was made make 26 U.S.C. 7212(a) unconstitutionally vague?

4. Did the Fourth Amendment to the United States Constitution require that Internal Revenue Agents obtain a warrant before going onto the private property of a third party to seize property belonging to a delinquent taxpayer?

5. Did the IRS agents fail to serve the required notices of levy on the proper parties and therefore engaged in an unlawful seizure?

6. Was the Government's Motion in Limine improperly granted?

STATEMENT OF CASE

NATURE OF THE ACTION:

This case involves a criminal prosecution brought against Bert Reece, appellant herein, under 26 U.S.C. §7212(a), (§7212(a) of the Internal Revenue Code), charging the defendant with endeavoring to intimidate and impede officers of the Internal Revenue Service, who were attempting to levy upon personal property belonging to a third party, but located upon the defendant's property. The instant action is for a review of the trial court's rulings denying the defendant's motion to dismiss and to quash certain testimonial evidence, rejecting the defendant's proposed instructions 1 and 3, and granting the government's motion in limine.

On March 16, 1977, an information was filed against Bert Reece in the United States District Court for the District of Montana, charging a violation of 26 U.S.C. §7212(a). The defendant filed a motion to dismiss the information and to quash the testimonial evidence of the Internal Revenue agents involved in the confrontation leading to the filing of the information. These motions were denied by the Court on May 11, 1977.

On May 16, 1977, the United States filed a motion in limine seeking an order to exclude from the trial any and all testimony with respect to the Internal Revenue Service's levy upon assets of the IBM Corporation in 1976 and any wrongful levy by the Internal Revenue Service upon any assets belonging to Bert Reece. This was objected to by the defendant. The government's motion was granted at the begining of the trial.

On May 16, 1977, this matter came to trial before a jury. Prior to the case's being submitted to the jury, the court rejected the defendant's proposed instructions one through three, and denied a defense motion for judgment of acquittal. A jury verdict of guilty was returned on May 17, 1977.

The defendant filed a timely notice of appeal. That the Ninth Circuit Court upheld the lower court's decision. Petition for rehearing was denied on August 28, 1978.

NATURE OF THE JUDGMENT:

The trial court denied the defendant's motion to dismiss and to quash testimonial evidence, rejected the defendant's proposed instructions No. 1 and 3, granted the plaintiff's motion in limine, and denied defendant's motion for acquittal.

STATEMENT OF FACTS:

On March 10, 1977, Internal Revenue agents Mark Murray and Timothy Chamberlin went to 926 Main Street, Billings, Montana, for the purpose of executing a levy on property owned by a delinquent taxpayer, M-R Enterprises. The agents allegedly sought to seize a 1973 Chevrolet pick-up, (Reporter's Transcript, page 17), which had been parked at this location for several days due to mechanical difficulties (RT 109). The property at 926 Main was owned by Able Contractors, of which the defendant, Bert Reece, is the president. (RT 143, 139). On this date, the property was being used as a storage yard by Able Contractors, (RT 146). Agent Chamberlin was aware that this property was owned by Reece's company and not by the delinquent taxpayer.

When the Internal Revenue Agents arrived at 926 Main, they entered a trailer which was parked on this lot and which had an M-R Enterprises' sign on its side (RT 20). Inside this trailer they encountered a young woman, subsequently identified as Ramona Murray, the daughter of the defendant. Ramona was not then employed by M-R Enterprises, and was at this office solely to pick up some papers for Mrs. Reece (RT 107). The agents showed Ramona their identification and informed her that they were there to seize the pick-up truck for non-payment of taxes (RT 26-27). Ramona attempted to telephone Michael Reece, of M-R Enterprises, but she was unable to reach him. Ramona did, however, contact Bert Reece and informed the agents that Bert Reece had an interest in the vehicle and would be right over. (RT 28). Agent Murray then began reading to Ramona a copy of the notice of levy from 668(b), while agent Chamberlin went outside to tag the vehicle. (RT 29). The agents immediately acted to complete their seizure of this vehicle irrespective of the fact that another party may have had an interest in the vehicle, and without allowing any time for such an individual to discuss or protest the seizure.

After talking with his daughter, Bert Reece drove immediately from his main place of business, at 815 Main Street, Billings, to the property at 926 Main. On arrival, he saw that agent Chamberlin had placed a tag on the Chevrolet pick-up. (RT 149).

Reece removed this tag and informed agent Chamberlin that he felt that the agents were trespassing and needed a court order, since they were on private property belonging to Able Contractors. (RT 149-150). At this time, agent Murray and Ramona came out

of the trailer and agent Murray identified himself as an Internal Revenue agent. Reece repeated to agent Murray that he felt that the agents were trespassing and needed a court order to be on the property and further requested them to leave. (RT 150-151). Although rulings of the trial court prevented Reece from giving testimony at the trial explaining his concern over the Internal Revenue Service's seizing anything on this property, this concern, which was based on a part experience Reece had had with such seizures, was the factor underlying Reece's seeking to protect his property.

Bert Reece's testimony at trial shows that in response to his request that the agents leave until such time as they had a court order, agent Murray stated that they did not need a court order and that they could continue with what they were doing. (RT 151). The agents did not, however, attempt to read the notice of levy form or serve him with any notice of levy even though aware that Reece was the owner of the premises on which the property to be seized was located. (RT 152).

Desiring to protect his own property and to prevent any further difficulties, Reece informed the agents that he was going to get the sheriff. He returned to his truck, stating to his daughter Ramona:

> A. Yes, I do. And then I called to Ramona, I said, "I am going to go and I am going to get the Sheriff and I will be come back armed with an arrest warrant and get these people out of here."
>
> (RT 153).

Bert Reece started to drive away, but noticed, in his rear view mirror, that the agents were continuing with their procedure to seize property. (RT 154). Reece backed his own truck up next to the pick-up being seized. As he got out of his truck, Reece instructed his daughter to call his attorney. (RT 155). While she was making this call, Reece again told the agents that he felt they had to leave his property and obtain a court order before they could return. (RT 156). Ramona then called from the front of the trailer to let Reece know that his attorney was on the phone. Reece went to the trailer to talk with his attorney, thus ending this brief confrontation.

REASONS FOR GRANTING THIS WRIT

I.

THE NINTH CIRCUIT COURT'S DECISION OVERLOOKED THE QUESTION OF INSTRUCTING THE JURY THAT THEY MUST MAKE A FINDING THAT THERE WAS A "TRUE THREAT" IN ORDER TO PROTECT THE DEFENDANT'S FIRST AMENDMENT RIGHT.

II.

THE CIRCUIT COURT'S DECISION WAS ERRONOUS WHEN IT HELD THAT THE IRS AGENTS WERE LEGALLY ENGAGED IN THEIR OFFICIAL DUTIES AT THE TIME OF THE INCIDENT.

III.

THAT THE CIRCUTT COURT FAILED TO FIND 26 U.S.C. §7212(a) UNCONSTITUTIONALLY VAGUE.

IV.

THE CIRCUIT COURT ERRONOUSLY HELD THAT THE IRS AGENTS WERE NOT REQUIRED TO FOLLOW THE STATUTORY PROCEDURE FOR SEIZURE OF THE PROPERTY INVOLVED.

V.

WAS THE GOVERNMENT'S MOTION IN LIMINE IMPROPERLY USED TO EXCLUDE EVIDENCE AND AN IMPROPER RESTRICTION ON THE DEFENDANT'S RIGHT TO CROSS-EXAMINATION.

ARGUEMENT OF APPELLANT

Summary of Argument:

The freedom of speech protections embodied in the First Amendment to the United States Constitution create limitations upon the government's power to impose criminal sanctions on the making of threatening statements. Threatening speech may be proscribed, and the speaker subjected to criminal liability only upon a finding, by the trier of fact, that the speaker meant his words to constitute a true threat and intended that his listener understand his words to constitute a true threat. Particularly, the prohibition contained in 26 U.S.C. §7212(a) must be construed as requiring such a finding in order to prevent this statutory provision from being unconstitutionally vague with respect to the applicable test for ascertaining guilt thereunder. The defendant in the present case requested that the jury be instructed as to the need for this essential finding and as to the proper definition to be given the term "threat of force" as that term is used in 26 U.S.C. §7212(a). It is the defendant's contention that the denial of these proposed instructions constituted reversible error and requires that his conviction be overturned.

Before an individual may be found guilty of endeavoring to interfere with an Internal Revenue Service agent acting in his official capacity, the government agent must be shown to have been legally and properly engaged in his official duties at the time of the incident giving rise to the prosecution. The agents in the present case were not legally engaged in the official duties due to their failure to obtain a warrant prior

to entering upon the defendant's property. Such a warrant should be required when government agents attempt to seize items belonging to a delinquent taxpayer which are located on the property of or in the possession of an individual other than the delinquent taxpayer. Additionally, the agents in the present case were not properly engaged in their official duties at the time in question inasmuch as they failed to serve the required notice of levy upon the individual in possession of the property to be seized. Based upon these legal grounds, it was improper for the trial court to deny the defendant's motion to quash the information and to quash the testimonial evidence of the Internal Revenue Service agents.

Motions in limine should properly be used to control the jury's exposure to potentially prejudicial matter. The motion in limine is designed to add a procedural step during trial to the admission of evidence. A motion in limine should not be granted for the purpose of totally excluding evidence, as was done in the present case. Additionally, the motion as granted improperly restricted the defendant's right to cross-examine the government's witnesses against him as to any bias or prejudice these witnesses may have felt toward the defendant. The granting of the government's motion in limine was thus improper and requires a reversal of the defendant's conviction.

<u>The Denial of the Defendant's Proposed Instructions No's. 1 and 3 was erroneous.</u>

A. A conviction under 26 U.S.C. §7212(a) must require a finding that a true threat was made.

Defendant was prosecuted under 26 U.S.C.

§7212(a) which provides that:

> "Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of forece (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of forece", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family."

The jury was duly instructed that a conviction in this prosecution would require that the jury find that the defendant endeavored by threats of force to intimidate and impede to the revenue officer whom the defendant knew to be revenue officers acting in their official capacity. (RT 209). Additionally, the jury was instructed that the terms threats of force meant threats of bodily harm to the officer or employee of the United States or to a member of his family. (RT 208).

In opposition to these instructions, the defendant contended that the jury be required to find not only that the defendant intimidated or impeded these officers by threats

of force while they were acting in their official capacity, but also that the words alleged to constitute the threat were uttered by the defendant, were spoken as a true threat, and were intended to be taken as a threat. Additionally, the defendant sought to have the jury instructed differently as to the definition of "threat of force" and be instructed as to the meaning of a "true threat". Specifically, the defendant offered the following two instructions:

INSTRUCTION No. 1

Three essential elements are required to be proven in order to establish the offense charged in the information as follows:

First: that defendant did intimidate and impede by threats of force officers of the Internal Revenue Service, Department of the Treasure, while said officers were acting in an official capacity, as charged; and

Second: that defendant uttered the words alleged to constitute the threat as charged in the complaint; and

Third: that the words were spoken as a true threat as defined in these instructions and that defendant intended his statement to be taken as a threat.

As stated before, the burden is always on the prosectuion to establish every element of the offense beyond a reasonable doubt. The law never imposes on a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

INSTRUCTION NO. 3

The term "threat of force" means an avowed present determination or intent to intimidate or impede in the present or future. A statement may constitute a threat even though it is subject to a possible contingency within the maker's control.

The prosecution must establish "true threat," which means a serious threat as distinguished from words uttered as mere political argument, idle talk or jest.

In determining whether words were uttered as threat the context in which they were spoekn must be considered.

These instructions presented the defendant's theory that a conviction under this statutory provision for merely uttering words constitutes an unconstitutional impairment of the defendant's First Amendment right of freedom of speech unless it is found that the defendant made an unequivocal, unconditional and specific expression of intent to immediately inflict injury. These proposed instructions were rejected by the trial court.

Statutory provisions imposing criminal liability for the making of threats may be found with respect to many areas of legitimate governmental concern. One such provision may be found in 18 U.S.C. §871(a) proscribing knowingly and willfully making threats to take the life of or to inflict bodily harm upon the President of the United States. In Watts v. United States, 394 U.S. 705, 89 S.Ct 1399, 1399, 22 L.Ed. 2d 664 (1969).

In its decision, the Supreme Court recognized the conflict between permissible regulatory legislation and the dictates of the First Amendment. After holding that this staute was certainly constitutional, the court stated, at p. 707:

> Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinquished from what is constitutionally protected speech.

There was a conflict in the testimony on what was actually said. Assuming argumento, the words spoken were as stated by the IRS agents, to-wit: "You guys better be gone when I get back because I'm coming back armed and then you will really be gone", (TR 35), the defendant's statement because of its conditional nature and the context in which it was spoken, could not be considered as being a serious threat. Nor would these factors allow the conclusion that the statement was intended to be taken as a serious and imminent threat. The Watts holding clearly implies, however, that a conviction based on the making of threats requires a finding that the statements were made and intended to be understood as true and serious threats. The defendant's rejected instructions in the present case merely sought to inform the jury of the need for such findings.

In United States v. Kelner, 534 F.2d 1020 (2nd Cir. 1976), upholding a conviction for causing to be transmitted in interstate commerce a communication containing a threat to injure the person of another, analyzed the Watts decision with respect to the definition of the term "threat". The appellant

therein contended that his statements were mere political hyperbole and were not threats within the statutory provision under which he was being prosecuted. The argument was unavailing, however, since the trial court had instructed the jury to determine if the statements were intended as threats or were merely a statement of opposition to the person threatened. In agreeing with this action by the trial court, substantially similar, if not identical to that requested by the defendant in the present case, the Court of Appeals for the Second Circuit construed Watts as meaning that punishable threats were only those threats which conveyed a gravity of purpose and likelihood of execution. The court stated, at p. 1027:

> The purpose and effect of the Watts constitutionally-limited definition of the term "threat" is to insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished -- only such threats, in short as are of the same nature as those threats which are, as Judge Wright recognizes, "properly punished every day under statutes prohibiting extortion, blackmail and assult without consideration of First Amendment issues." Watts, supra, 402 F.2d at 690. The Watts requirement of proof of a "true threat", it may be seen, works ultimately to much the same purpose and effect as would a requirement of proof of specific intent to execute the threat because both requirements focus on threats which are so unambiguous and have such immediacy that they convincingly express an intention of being carried out.

> So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied.
>
> (Emphasis added.)

This excellent analysis of the Watts holding shows that an individual should not be punished merely for saying words capable of being understood in a threatening manner. The mere speaking of words cannot constitute a punishable threat absent a finding that the charged individual intended to make a true threat. Such a finding was essential to support a conviction under the previously discussed statutes, and must be required under the statutory provision presently being considered. By not requiring a finding as to the true nature of the statement made, the court below applied an "objective" construction to 26 U.S.C. §7212(a), which allowed a conviction for the mere making of a statement capable of being understood as a threat, if the speaker intended to make the statement and knew the meaning of the words used. The propriety of using such an objective construction on a criminal statute has been seriously questioned by the United States Supreme Court.

Rogers v. United States, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975), involved a prosecution under 18 U.S.C. §871(a), the same statutory provision ruled upon in Watts. In this case, the majority disposed of the appeal on a procedural point rather than ruling on the issue for which certiorari

had been granted. A concurring opinion by Justice Marshall, joined in by Justice Douglas, reached the merits, however, and concluded that a conviction under this statute should require proof that the speaker intended his statement to be taken as a threat, taking into consideration the circumstances under which the statement was made. 422 U.S. at 48. Based on this conclusion, Justices Marshall and Douglas agreed that Rogers' conviction below should have been reversed, since the jury had been instructed in accordance with the"objective construction" of the statute. Justice Marshall's opinion clearly set forth the potential conflict between the application of the "objective construction" and the courts holding in Watts, at pp. 43-44:

> The District Court charged the jury in accordance with the "objective construction." The jury was instructed in effect that it was not required to find that the petitioner actually intended to kill or injure the President, or even that he made a statement that he thought might be taken as a serious threat. Instead, the jury was permitted to convict on a showing merely that a reasonable man in petitioner's place would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act. In addition, the court charged that the jury could find petitioner guilty if his statements evinced "an apparent determination to carry out the threat."

2 Tr. 177. In my view, this construction of §871 is too broad.

> In Watts, we observed that giving §871 an expansive construction would create a substantial risk that crude, but constitutionally protected, speech might be criminalized. The petitioner there had been convicted for telling a small group at a political rally: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." We held that the statement, even if "willfully and knowingly" made, was not a true "threat" but merely a form of political hyperbole. Applying the statute with an eye to the danger of encroaching on constitutionally protected speech, we held that the comment in Watts fell outside the reach of the statute as a matter of law. Although the petitioner in the present case was not at a political rally or engaged in formal political discussion, the same concern counsels against permitting the statute such a broad construction that there is a substantial risk of coviction for a merely crude or careless expression of political enmity.

(Footnote omitted.)

In directly responding to the government's argument that the objective construction should properly be applied, Justice Marshall stated, at 47:

> Because §871 was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself, I believe that the statute should be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President. This construction requires proof that the defendant intended to make a threatening statement, and that the statement he made was in fact threateing in nature. Under the objective construction by contrast, the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention. In essence, the objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes, see Morissette v. United States, 342 U.S. 246 (1952); we should be particularly wary of adopting such a standard for a statute that requlates pure speech. See Abrams v. United States, 250 U.S. 616, 626-627 (1919) (Holmes, J., dissenting).

(Emphasis added.)

In conclusion, essentially it must be shown that the speaker actually intended a true and serious threat. The jury must be apprised of this narrow definition as to what constitutes a punishable threat. The rejected instructions put forth by the defendant would have properly placed the need for such a finding before the jury in this case.

Absent the requirement of a finding that a true threat was made, 26 U.S.C. §7212(a) is unconstitutionally vague.

It is a well established concept of constitutional law that statutory provisions will be invalidated when the language of the statute fails to give an individual of ordinary intelligence fair notice of that which is proscribed. Under a more particularized aspect of this doctrine, vagueness may be said to result from uncertainty with respect to the applicable test for ascertaining guilt. United States v. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct.298, 65 L.Ed 516 (1921); Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 52 S.Ct.559, 76 L.Ed 1062 (1932); Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 94 L.Ed 299 (1948). It is precisely this type of vagueness that 26 U.S.C. §7212(a) suffers from when it is applied without requiring a finding that the defendant meant and intended a true threat. Without this requirement, the objective construction controls the statute's application, thereby impermissibly leaving local authorities, courts, and juries free to apply their own standards as to what constitutes guilt. See, Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 29 L.Ed. 2d 605 (1974).

United States v. Cohen Grocery Co., supra, involved a challenge to the constitutionality of the Food Control Act of August 10, 1917, specifically that section forbidding the charging of excessive prices or unreasonable rates with respect to any necessaries. The defendant had been charged with two violations of this provision and demurred to the charge on several grounds, including the argument that the statute was, at pp. 86-87:

> So indefinite as not to enable it to be known what was forbidden, and therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable. . . .

In affirming the lower court's decision to quash the indictment because the law fixed no immutable standard of guilt, but left the standard to the variant views of the different courts and juries which may be called on to enforce it, the United States Supreme Court reasoned, at p. 89:

> The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words "That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately

> guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.

This statement of the court shows that the statutory language was far too general in nature and potentially wide in application to satisfactorily inform individuals of the conduct intended to be proscribed. Similarly, general language in an Oklahoma statutory provision punishing "waste" in the marketing and production of crude oil led the United States Supreme Court to reiterate in Champlin Refining Co. v. Corporation Commission of Oklahoma, supra., at p. 243:

> In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. United States v. Cohen Grocery, 255 U.S. 81, 89. Small Co. v. Am. Sugar Rfg. Co., 267 U.S. 233, 239. Connally v. General Construction Co., supra. Cline v. Frink Dairy Co., 274 U.S. 445, 454. Smith v. Cahoon, 283 U.S. 553, 564.

Accord, Winters v. New York, supra.

The shortcoming of these statutes was the use of general language, needed to provide the statutory prohibition a broad scope, which was capable of such a broad application that the statute itself did not provide a clear standard upon which to determine an individual's guilt or innocence. The language under which the defendant herein was prosecuted - "Whoever corruptly or by force or threats of force endeavors to intimidate or impede any officer or employee" - also fails to provide any clear standard upon which to ascertain an individual's criminal liability. As the Supreme Court noted in Champlin Refining, supra, it is the absence of this standard which requires the statute's invalidation. Without a definite standard, the local authorities, court and jury are left free to impose that standard of conduct which their own preferences may dictate. Such a result has been expressly condemned by the United States Supreme Court, Smith v. Goguen, supra, at p. 578:

> This absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause. The deficiency is particularly objectionable in view of the unfettered latitude thereby accorded law enforcement officials and triers of fact. Until it is corrected either by amendment or judicial construction, it affects all who are prosecuted under the statutory language. In our opinion the defect exists in this case. The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard

> so indefinite that police, court, and jury were free to react to nothing more their own preferences for treatment of the flag.

It is, therefore, apparent that the statutory provision involved herein, as applied by the trial court below, lacks the required specificity in defining the nature of the conduct prohibited. Unless the statute is construed as requiring a finding by the jury that the defendant intended his words to constitute and be understood as a serious, present threat of injury, the statutory provision must be held to be unconstitutionally vague and any conviction thereunder invalid.

The Internal Revenue Service Agents Were Not Properly and Legally Engaged in Their Official Duties At the Time of the Incident Involved, and Thus the Denial of the Defendant's Motion to Dismiss was in Error.

As previously noted, the defendant was convicted of endeavoring to interfere with or impede an Internal Revenue Service agent acting in his official capacity. The validity of such a conviction rests upon a basic premise that the government agents were properly engaged in their official capacity and were legally engaged in carrying out their official duties at the time of the incident giving rise to this prosectuion. This premise rests upon the ideal that an individual may not be prosecuted for exercising his legal right to resist an unconstitutional invasion of his property. An application of this ideal to another area of power belonging to the Internal Revenue Service occurred in Cooper v. United States, 299 F. 483 (3rd Cir. 1924). In this case, the defendant Cooper had been convicted of the unlawful rescue of property which had

been seized by internal revenue officers. In reversing this conviction, the Court of Appeals for the Third Circuit recognized that an individual may not be punished for opposing the actions of a government official when those actions are themselves improper. The Court held, at p. 484:

> The offense denounced by the statute has two essential ingredients--seizure of merchandise and rescue of merchandise seized. But there is more in it than this. There must be an unlawful rescue of merchandise lawfully seized. United States v. Page (D.C.) 277 Fed. 459. Hence, lawful seizure is not only an ingredient preliminary to an unlawful rescue but it is a prerequisite. And the lawfulness of the seizure must be shown.

Accord, United States v. Heck, 499 F.2d 778 (9th Cir. 1974).

Since the government here failed to allege facts and circumstances which established that the agent's seizure was lawfully made, the defendant's rescue of the seized property could not be held to be wrongful. Since the seizure was not shown to have been lawful, the defendant was merely exercising his right of control over his own property. This exercise of the defendant's property rights could not constitute a violation of the statute involved.

In United States v. Dentice, 289 F.Supp. 799 (E.D.Wis. 1968), the defendant challenged his indictment for assulting, resisting and interfering with an Interanl Revenue Service agent on the grounds that no offense had been committed. This was based on the argu-

ment that the officers were acting beyond the scope of their authority at the time of the incident, since the officers were attempting to execute a search warrant not based on probable cause and, thus, invalid. Although denying the defendant's motion for acquittal, the court did resolve the preliminary question as to whether the validity of the search warrant was an issue in the case. The court stated, at p. 800:

> The answer to this legal question has been perhaps most succinctly stated in Sparks v. United States, 90 F.2d 61 (6th Cir. 1937):
>
> > "The validity of the search warrant is always relevant on the question of obstructing an officer in the performance of his duties. Resistance to a search carried out under an invalid warrant is not illegal. * * *"
>
> This line of reasoning appears to have been earlier adopted in the Seventh Circuit in the case of Dovel v. United States, 299 F. 948 (7th Cir. 1948), when the Court said:
>
> > "* * *The gist of the action is resistance to one serving a search warrant. There can be no unwarrant, and there can be no valid search warrant unless a proper showing is made to the court or commissioner disclosing facts which bring the petitioner within the statute. * * *"
>
> This case does not appear to have been overruled.

> The logic of this position appears to this court to be irrefutable. If the statute making it a crime to resist an officer in the performance of his official duties did not require that the officer in fact be acting in an official capacity -- i.e., pursuant to valid authority -- then criminal sanctions could be imposed upon a citizen for asserting his constitutional rights. Such a result would clearly not be consonant with our system of constitutional safeguards and protections.

The Fourth Amendment to the United States Constitution requires Internal Revenue agents to obtain a warrant before going onto the private property of a third party to seize property belonging to a delinquent taxpayer.

The legality of these summary tax collection procedures has been the subject of prior extensive litigation and can not now be doubted. Phillips v. Commissioner, 283 U.S. 589, 57 S.Ct 608, 75 L.Ed 1289 (1931). Unresolved, however, is the question as to the need for agents of the Internal Revenue Service to obtain a warrant prior to invading the property of an individual other than the delinquent taxpayer for the purposes of effectuating the summary collection procedures.

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing

> the place to be searched, and the persons or things to be seized.

This prohibition against warrantless searches and seizures is a fundamental aspect of American jurisprudence. The Internal Revenue Service's summary tax collection powers are subject to and limited by this prohibition. In G.M. Leasing Corp. v. United States, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977), the United States Supreme Court acknowledged the validity of the summary collection procedure but also held that there was no per se exemption from the warrant requirement for this collection of taxes. The court stated, at pp. 357-358:

> The respondents argue that the interest in the collection of taxes is such as to bring this case within the reasoning of Biswell and Colonnade. Those cases involved voluntary participation in a highly regulated activity. Section 6331, however, covers all defaults on all taxes, and we are unwilling to hold that the mere interest in the collection of taxes is sufficient to justify a statute declaring per se exempt from the warrant requirement every intrusion into privacy made in furtherance of any tax seizure.

(Emphasis added.)

Thus, the governmental interest in collecting taxes must be reconciled with the individual's paramount right to be secure in his property.

The government agents failed to serve the required notice of levy on the proper party and were therefore engaged in an invalid seizure.

During the course of the trial below, agent Murray of the Internal Revenue Service testified that the notice of levy was served upon and read to Ramona Reece Murray. (TR 28-29). The defendant was not served with the required notice of levy, even though the property to be seized was immobilized on property belonging to the defendant's company and therefore within the constructive possession of the defendant. Additionally, it was established at trial that Ramona Reece Murray was not a responsible official of the delinquent taxpayer company, and was, in fact, not even in the employment of this company. (RT 107) This failure to serve the defendant with the notice of levy must be held to be fatal to the validity of the attempted seizure in this case.

The Internal Revenue Code and the regulations promulgated pursuant thereto require that a levy may be made by serving a notice of levy on a third party holding property of the delinquent taxpayer. Treas. Reg. §301.6331-1(a) (1973) provides, in part, that:

> Levy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property subject to levy including receivables, bank accounts, evidences of debt, securities, and accrued salaries, wages, commissions, and other compensation. A levy extends only to property possessed and obligations which exist at the time of the levy.

The notice must be served upon the individual in possession of the property to be seized. It is stated in 9 Mertens, Law of Federal

Income Taxation, §49.190 that:

> The Government has successfully urged that under Section 6331 of the 1954 Code a warrant of distraint is no longer necessary and that the only prerequisite to an effective levy and constructive seizure of the property is a prior notice and demand to the delinquent taxpayer and service of a notice of levy on the third party holding property of the taxpayer. The Regulations provide that a levy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property subject to levy.

(Emphasis added and footnotes omitted.)

See also, United States v. Pittman, 449 F.2d 623 (7th Cir. 1971), which recognized that the service of the notice of levy was an essential element to the making of an effective levy.

Clearly this notice of levy is required to satisfy the principles of due process. Yet, it is fundamental that any safeguards of the taxpayer's rights which are to be served by this notice requirement can not be satisfied by the service of notice on a third party who is neither in possession of the property to be seized nor even employed by the delinquent taxpayer. The due process protections sought to be advanced by this notice requirement dictate that the notice must be served upon a party in possession of the property to be seized. The proper service of this notice of levy upon the party in possession must be a prerequisite to the making of a valid and lawful levy. The evidence in the present case has established that this notice was not properly

served upon the defendant. The attempted levy must, therefore, be considered as ineffective and unlawful. The defendant should not have been prosecuted for exercising his legal rights in opposing such a levy. The invalidity of this attempted levy requires a reversal of the defendant's conviction and the dismissal of the information filed against him.

Motions in limine may not properly be used to exclude evidence.

Although the use of motions in limine is not subject to or controlled by any formal rules of evidence or procedure, the proper role for these motions has been clarified by substantial case law. This authority shows that these motions are of a procedural nature, as opposed to being used for obtaining substantive evidentary rulings. The motion's proper role is to impose an additional procedural step on the admissibility of evidence which is claimed to be of an impermissibly prejudical nature. The motion should properly be granted to control the jury's exposure to this potentially improper evidence, but is improperly granted when used to obtain the suppression of particular evidence.

Baldwin v. Inter City Contractors Service, Inc., 297 N.E.2d 831 (Ind.App. 1973), involving an action to enjoin the construction of low rent housing units, presents a clear statement as to the proper use of a motion in limine. In this trial to the court, the defendant filed a motion in limine to exclude certain evidence as irrelevant. In reversing the trial court's grant of this motion, the Court of Appeals of Indiana stated, at pp. 833-834:

> This cause was being tried by a trial court. The trial court's ruling

upon the "motion in limine" excluded expert testimony as irrelevant. A "motion in limine" has no place or use in this setting. Its use is limited to the jury trial. Secondly, this court has held that the "motion in limine" has a very restricted use which flows from the trial court's inherent power. This restricted use is to exclude prejudicial matters. The exclusion by the trial court may encompass both prejudicial and irrelevant matter, but the primary purpose for granting the motion must be that the matter excluded would be prejudicial to the moving party. Burras v. Silhavy, (1973), Ind.App., 293 N.E.2d 794.

Inter City's use of the "motion in limine" is not only improper, but the prayer for relief goes far beyond the purpose of a "motion in limine." In their motion, Inter City prays for the following relief:

". . .the plaintiffs be precluded from introducing any testimony or evidence tending to prove or disprove such contentions."

The trial court's granting of the "motion in limine" precluded, in advance of trial, any attempts by Baldwin to offer expert evidence during the trial. As stated by Davis, Motions in Limine, 15 Clev.-Mar.L.Rev. 255, the proper form of the prayer should be:

"Wherefore, plaintiff respectfully requests the Court to instruct the defendant and all its counsel not to mention, refer to, interrogate concerning, or attempt to convey to the jury in

any manner, either directly or indirectly, any of the above mentioned facts, without first obtaining permission of the Court outside the presence and hearing of the jury, and further instruct the defendant and all its counsel not to make any reference to the fact that this motion has been filed and granted and to warn and caution each and every one of their witnesses to strictly follow these same instructions."

The misuse of a "motion in limine" and the trial court's subsequent ruling thereon is error and must be reversed.

Accord, Bridges v. City of Richardson, 163 Texas 292, 354 S.W.2d 366 (1962).

In Lewis v. Buena Vista Mutual Insurance Association, 183 N.W.2d 198 (Iowa 1971), the Iowa Supreme Court reviewed the development and use of motions in limine and expressed concerns over the improper use of such motion. The court explained, at pp. 200-201:

> The motion in limine is a useful tool, but care must be exercised to avoid indiscriminate application of it lest parties be prevented from even trying to prove their contentions. That a plaintiff may have a thin case or a defendant a tenuous defense is ordinarily insufficient justification for prohibiting such party from trying to establish the contention. Nor should a party ordinarily be required to try a case or defense twice -- once outside the jury's presence to satisfy the trial court of its sufficiency and then again before the jury. Moreover, the motion in limine is not ordinarily employed to choke off an entire claim

or defense, as it was here regarding arson. Rather, it is usually used to prohibit mention of some specific matter, such as an inflammatory piece of evidence, until the admissibility of that matter has been shown out of the hearing of the jury. E.g., Mead v. Scott, 256 Iowa 1285, 130 N.W.2d 641 (previous accidents); Wagner v. Larson, 257 Iowa 1202, 136 N.W.2d 312 (collateral benefits and marital trouble); Baysinger v. Haney, 155 N.W. 2d 496 (Iowa) (indirect revelation of contents of privileged report). Numerous other illustrations are set out in Davis, The Motion In Limine -- A Neglected Trial Technique, 5 Washburn L.J.232. See also Holtorf, Motions to Limit Evidence, 46 Neb.L.Rev. 502.

We deem this appeal an appropriate one in which to say that cases are coming to this court revealing questionable use of motion in limine -- questionable in the manner of its use or in its use at all. The motion is a drastic one, preventing a party as it does from presenting his evidence in the usual way. Its use should be exceptional rather than general. Trial counsel would be well advised to keep in mind the suggestions found in Sidney, Motion in Limine, Workshop Outlines at Ninety-Second Annual Meeting, Iowa State Bar Association, A1 at A8-A9 (1965). The motion should be used, if used at all, as a rifle and not as a shotgun, pointing out the objectionable material and showing why the material is inadmissible and prejudicial.

Additionally, the government's motion in this case sought to affect the admissibility

of the particular evidence on an improper basis. Through out its memorandum in support of the motion in limine, the government argues that the evidence to be excluded is irrelevant. (CT 59-60) The relevancy of any particular item of evidence is not properly addressed by a motion in limine. These motions are properly concerned only with controlling the jury's exposure to prejudicial or potentially prejudicial material. The relevancy of an item of evidence is dependent upon the purpose for which it is offered and the posture of the trial at the time it is offered. Motions in limine are properly concerned only with the prejudicial nature of the evidence involved and should not be granted solely as a pretrial determination of the relevancy of the evidence.

Initially, it is to be noted that the motion in limine was ruled upon at the very beginning of the trial. In granting the government's motion, the trial judge was clearly ruling on the relevancy and admissibility of this particular evidence for any purpose connected with this trial. The court's ruling was obviously a final decision as to the admissibility of any matter concerning Bert Reece's intentions on March 10, 1977. The court stated:

> Frame of mind really isn't the issue. If the Government is able to establish, number one, that the defendant knew that the agents were internal revenue agents, and, two, that they were making a levy and he stopped them, that is the essence of the crime charged.

(RT 5)

When defense counsel expressed concern

over being able to effectively cross-examine the government's witnesses, the court reiterated the finality of its ruling with respect to the matters covered by the motion in limine.

> Now, the only evidence the Court is going to hear from the Government is what was done to inform the defendant that they were in fact officers of the Internal Revenue Service and what Mr. Reece did to endeavor to intimidate and impede them in the levy. And that is the only issue before the Court.

(RT 7)

The court's ruling on this matter was final and must be held to have informed defense counsel that any further offers of this evidence would be fruitless.

The granting of the motion in limine imposed improper restriction on the defendant's right to cross-examination.

The finality of the trial court's ruling excluding all testimony concerning either the 1976 seizure of property from the TBM Construction Company or any wrongful seizure of property not belonging to the defendant not only represents an improper use of the motion in limine, this ruling also operated to impermissibly restrict the defendant in his cross-examination of the government witnesses. By excluding all testimony regarding these events, the trial court forclosed any inquiry into these matters for the purpose of showing bias or prejudice on the part of the witnesses toward the defendant. While it is recognized that the scope of cross-examination to be allowed is a matter within the discretion of the trial judge, a paramount rule requires

that a party be allowed effective cross-examination of the witnesses against him. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 39 L.Ed2d 347 (1973); U.S. v. Norman, 402 F.2d 73 (9th Cir. 1968). Effective cross-examination by the defendant is a matter of right protected by the Sixth Amendment to the United States Constitution and is not a mere privilege. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed 2d 923 (1964); Wiseman v. Reposa, 463 F.2d 226 (5th Cir. 1972): J.E. Hanger, Inc. v. United States, 160 F.2d 8 (D.C.Cir. 1947).

In Davis v. Alaska, supra., The United States Supreme Court reiterated the fundamental nature of this right and clearly recognized one of the essential purposes of effective cross-examination, at pp. 315-316:

> The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosection "to be confronted with the witnesses against him." This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400 (1965). Confrontation means more than being allowed to confront the witness physically. "Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination." Douglas v. Alabama, 380 U.S. 415, 418 (1965). Professor Wigmore stated:
>
> > "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the

> witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers." 5 J. Wigmore, Evidence §1395, p. 123 (3d ed. 1940) (Emphasis in original).

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight

> of his testimony." 3A J. Wigmore, Evidence §940, p. 775. (Chadbourn rev. 1970).

(Emphasis added.)

In preventing inquiry into past matters which could have affected the partiality of a witness toward the defendant, it is submitted that the trial court committed reversible error. Substantial authority may be cited which supports the defendant's right to inquire into matters so as to test the credibility of the government's witnesses. In Smith v. Illinois, 390 U.S. 129, 88 S.Ct 748, 19 L.Ed 2d 56 (1968), wherein the defendant was prohibited at trial from inquiring as to a witness' true name and place of residence, the United States Supreme Court cited the 1931 case of Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931), in reversing the conviction below. The court noted the complete applicability to cases involving a limitation on cross-examination of the following language from Alford, at p. 132:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensures from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony

> in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . .
>
> . . . . . .
>
> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. . . But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him... But no such case is presented here..." 282 U.S., at 692-694.

(Emphasis added.)

Statements respecting the right to test a witness' credibility may be found in innumerable decisions. United States v. Honneus, 508 F.2d 566 (1st Cir. 1974); United States v. Padgent, 432 F.2d 701 (2nd Cir. 1970); United States v. Barash, 365 F.2d 395 (2nd Cir. 1966); Battle v.United States, 345 F.2d 438 (D.C. Cir. 1965), See also, Federal Rules of Evidence, Rule 611(6).

As the United States Court of Appeal for the Second Circuit stated in Lewis v. Baker, 526 F.2d 470, 475 (2nd Cir. 1975);

> It is well-settled that the trial judge is accorded great discretion in

> his assessment of the matters which should properly be raised on cross-examination as bearing on the credibility of a party or witness. See, e.g., Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931); Wright v. United States, 87 U.S.App.D.C. 67, 183 F.2d 821, 822 (1950). The relevancy of testimony which aids in the jury's determination of a party's credibility and veracity has been repeatedly affirmed. Pullman Co. v. Hall, 55 F.2d 139, 141 (4th Cir. 1932); 3A Wigmore, Evidence §922 (Chadbourn rev. 1970); McCormick, Evidence §42 (1972).

(Footnote omitted.)

Additionally, greater latitude in the scope of cross-examination is to be allowed in criminal cases. In Jennings v. United States, 364 F.2d 513 (10th Cir. 1966), although the underlying conviction was affirmed, the Court of Appeals for the Tenth Circuit stated, at p. 515:

> Ordinarily the trial court has broad discretionary powers in permitting or limiting cross-examination. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 315 U.S. 827, 62 S.Ct. 629, 89 L.Ed. 1222; Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624; McManaman v. United States, 10 Cir. 327 F.2d 21; Foster v. United States, 10 Cir., 282 F.2d 222; Wilcoxon v. United States, 10 Cir., 231 F.2d 384, cert. denied 351 U.S. 943, 76 S.Ct. 384, 100 L.Ed. 1469. It is equally well established that in criminal cases great latitude is generally permitted in the cross-examination of a

> witness for the prosecution in order to test his credibility and to develop facts which may tend to show bias or prejudice or any other notice which the witness may have for giving his testimony. Gordon v. United States, 344 U.S. 414, 73 S.Ct. 369, 97 L.Ed 447; Alford v. United States, supra; Foster v. United States, supra; United States v. Masino, 2 Cir. 275 F.2d 129; 58 Am.Jur., Witnesses, §715; Anno. 62 A.L.R.2d 613.

(Emphasis added.)

Accord, United States v. Pfeiffer, 539 F.2d 668 (8th Cir. 1976); United States v. Leonard, 494 F.2d 955 (D.C.Cir. 1974); McConnell v. United States, 393 F.2d 404 (5th Cir. 1968); Harris v. United States, 371 F.2d 365 (9th Cir. 1967).

It is fundamental to the law of evidence that a witness' credibility may be attacked and diminished through cross-examination which reveals bias or prejudice on the part of the witness toward a criminal defendant. A criminal defendant must be afforded an opportunity to bring forth material which places the testimony of a witness against him in its proper setting. The bias or prejudice of a witness is clearly relevant in showing to the jury what the proper setting is and a limitation on cross-examination which prevents this material from being presented to the jury clearly constitutes prejudicial error. In Dickson v. United States, 182 F.2d 131 (10th Cir. 1950), the United States Court of Appeals for the Tenth Circuit acknowledged the United States Supreme Court's recognition of this principle in unquestionable language, at pp. 133-132:

> It is, of course, universally recognized that the trial court is invested with a broad discretion in the matter of permissible cross-examination of a witness, but as stated by the Supreme Court in District of Columbia v. Clawans, 300 U.S. 617, 15 S.Ct. 660, 81 L.Ed. 843, the court may not limit cross-examination so as to prevent bringing out matter material to the issue, and as stated by the Supreme Court in Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 85 L.Ed. 624, "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

(Emphasis added, and footnote omitted.)

There can be no doubt that cross-examination must be allowed into matters which may end to show a witness' bias or prejudice toward a defendant. A trial court's denial of this opportunity for cross-examination constitutes prejudicial and reversible error. Without a doubt, such an error occurred in this case during the trial below when the defendant was precluded from showing prior hostile dealings between one of only two government witnesses and the defendant. By granting the government's motion in limine, the trial court forbid any testimony concerning this prior encounter or the individual's reactions and feelings which resulted from this encounter.

The defendant was totally foreclosed from showing this encounter to the jury or from establishing any bias or prejudice to the defendant which may have resulted. The denial

of this opportunity to try and bring forth clearly relevent material which will place a witness' testimony in its proper setting constitutes reversible error without the defendant even needing to establish that discrediting testimony would have been adduced. Alford v. United States, supra.

Thus, it is clear that granting the government's motion in limine was erroneous action by the trial court. Such motions are properly used only to control the jury's exposure to prejudicial material, rather than to exclude evidence as being irrelevant. Furthermore, such a motion cannot be granted, even as an exclusionary ruling, so as to impermissibly cut off a defendant's right to attack the credibility of the witnesses against him by showing their bias or prejudice toward the defendant. The granting of this motion, therefore, must be held to constitute reversible error requiring that the conviction herein be set aside.

CONCLUSION

On the basis of the foregoing authorities and legal argument, the appellant respectfully requests that this court reverse the conviction of the defendant below and issue an order to the court below to dismiss all charges against this defendant arising from the incidents of March 10, 1977.

DATED this 26 day of October, 1978.

Respectfully submitted,

/s/ Charles E. Snyder

CHARLES E. SNYDER
1925 Central Avenue
Billings, Montana 59102
Attorney for Petitioner

AFFIDAVIT OF PROOF OF SERVICE

STATE OF MONTANA)
: ss.
County of Yellowstone)

I, CHARLES E. SNYDER, an attorney duly authorized to practice law in the State of Montana and the Courts of the United States of America, 1925 Central Avenue, Billings, Montana, attorney of record for Bert Reece, Petitioner herein, depose and say that on the 26 day of October, 1978, I served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit on the several parties thereto, as follows:

On the United States, by mailing copies in duly addressed envelopes, First Class, postage prepaid, to:

Robert T. O'Leary,
U.S. Attorney
U.S. Federal Building
Butte, Montana 59701

Helena S. Maclay
Assisstant U.S. Attorney
U.S. Federal Building
Butte, Mt. 59701

/s/ Charles E. Snyder

CHARLES E. SNYDER

SUBSCRIBED AND SWORN to before me this 26 day of October, 1978.

s/ Jacquelyn Grieben

Notary Public for the State of Mt.
Residing at Blgs, Mt.
My commission expires: 8-2-81

APPENDIX

A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	No. 77-2483
-vs-	)	
BERT REECE, Appellant.	)	MEMORANDUM

Appeal from the United States District Court for the District of Montana

Before: ELY and CHOY, Circuit Judges, and HALL, * District Judge

Appellant claims, inter alia, an improper conviction for endeavoring, by force and violence, to intimidate federal officers in the performance of their duties (26 U.S.C. §7212(a) because his conduct was protected by the First Amendment of the Constitution. The reason, says he, is that he really didn't mean what he said, i.e., he did not have the requisite intent. Intent is a question of fact. The jury was fully and fairly instructed on intent. It heard the testimony with all the circumstances surrounding the incident, including the defendant's testimony. It

* Peirson M. Hall, Senior District Judge, Central District of California, sitting by designation.

decided against him: i.e., that his talk, conduct and circumstances surrounding the incident were not "idle-talk" or "jest" or political hyperbole," as was exculpated in Watts v. United States, 394 U.S. 705 (1969), but were in fact well within the statute and disclosed the requisite intent. Quite evidently the jury believed that he said, and meant it when he said it, "you guys better be gone when I get back because I'm coming back armed and then you will really be gone," after tearing the notice of levy for another persons' tax off that other person's truck, parked on an open parking lot which up to a few days before was owned or controlled by that other person.

His contention that the act of the agents in coming on to an open, unenclosed lot, to post the notice of levy, required a prior search warrant is put at rest against him by G.M. Leasing Corp. v. U.S., 429 U.S. 328, (1977). Whether or not the premises were "open" was, like the question of his intent, a fact question, and was decided against the defendant under proper instructions.

The motion in limine to suppress his proposed evidence about the previous conduct of the agents was properly granted. Any previous conduct of the government agents had no relevance to conduct of defendant for which he was indicted. The court allowed sufficient latitude to defendant in cross-examination to develop any bias or prejudice of the agent as a witness.

Appellant's claim that the taxpayer-owner of the seized truck should have prior notice to make the posting legal is wholly without merit as such an act would negate the effectiveness of a statutory seizure by notice.

The judgment of conviction is affirmed.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	CR-77-17-BLG
-vs-	)	
BERT REECE,	)	JUDGMENT
Defendant.	)	

On the 10th day of June, 1977, came Robert L. Zimmerman, Assistant United States Attorney for the District of Montana, and the defendant, Bert Reece, appearing in his proper person and represented by his counsel, Charles E. Snyder, Esq.;

And the defendant, on the 18th day of May, 1977, upon his plea of not guilty and a verdict of guilty by a jury, duly and regularly impaneled and sworn, having been convicted of the offense charged in the information in the above entitled matter, to-wit:

That on or about the 10th day of March, 1977, at Billings, in the District of Montana, BERT REECE, by threats of force, did endeavor to intimidate and impede Timothy M. Chamberlin and Mark J. Murray, officers of the Internal Revenue Service, Department of the Treasury, while said officers were acting in an official capacity under Title 26, United States Code, and attempting to levy upon personal property

registered in the name of M-R Enterprises, Inc.

And the Court having now asked the defendant whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS THEREFORE ORDERED AND ADJUDGED BY THE COURT, that the defendant, BERT REECE, is guilty as charged in the information and stands convicted.

IT IS BY THE COURT ORDERED AND ADJUDGED that, the defendant, BERT REECE, having been convicted, upon his plea of not guilty and a verdict of guilty by the jury, of the offense charged in the information, imposition of sentence is deferred and said defendant is fined the sum of FIVE HUNDRED DOLLARS ($500.00), and placed on probation for the period of one (1) year, upon the following terms and conditions:

1. That he obey all Federal, state and local laws; and

2. That he comply with all rules and regulations of the United States Probation Department.

Done and dated this 16th day of June, 1977.

/s/ James F. Battin
UNITED STATES DISTRICT JUDGE

A P P E N D I X

B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	No. 77-2483
-vs-	)	
BERT REECE, Appellant.	)	ORDER

Before: ELY and CHOY, Circuit Judges, and HALL, * District Judge

The panel as consituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

* The Honorable Peirson M. Hall, Senior United States District Judge, for the Central District of California, sitting by designation.

Supreme Court, U. S.
FILED
FEB 1 1979
MICHAEL RODAK, JR., CLERK

No. 78-783

In the Supreme Court of the United States

OCTOBER TERM, 1978

BERT REECE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-783

BERT REECE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for making threats of force against two Internal Revenue Service agents while they were attempting to enforce a tax levy on property belonging to a third party. He contends that (1) the trial court erred in refusing to give certain of his proposed instructions, (2) the statute under which he was prosecuted is unconstitutionally vague, (3) the agents were not legally engaged in their official duties at the time of the alleged offense, (4) the agents were required to

have a warrant, (5) the agents failed to serve the notice of levy on the proper party, and (6) the trial court improperly granted the government's motion *in limine*.

After a jury trial in the United States District Court for the District of Montana, petitioner was convicted of endeavoring, by threats of force, to intimidate and impede Revenue Officers Timothy M. Chamberlin and Mark J. Murray while, in their official capacities, they were attempting to levy upon personal property belonging to a third party, in violation of 26 U.S.C. 7212(a) (R. 1).[1] The trial court deferred sentence, fined petitioner $500, and placed him on probation for one year (R. 130). The court of appeals affirmed (Pet. App. A).[2]

The evidence adduced at trial may be summarized as follows: Prior to March 10, 1977, Revenue Officer Murray was assigned to collect delinquent federal taxes owed by M-R Enterprises, Inc. He had determined that the corporation was located at 926 Main Street in Billings, Montana, and that its responsible officer was Michael Reece.[3] Murray also had determined that M-R Enterprises owned a 1973 Chevrolet custom pickup truck, and that no one else

[1] "R." refers to the duplicated repaginated record filed in the court of appeals.

[2] The judgment of the court of appeals was entered on June 8, 1978, and a petition for rehearing was denied on August 28, 1978. The petition for a writ of certiorari was filed on October 28, 1978, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.

[3] Michael Reece is petitioner's son (Tr. 130-131).

had any recorded interest in the vehicle (Tr. 17-18).

On March 10, 1977, Revenue Officer Chamberlin executed a levy on the truck, and he and Revenue Officer Murray attempted to seize it (Tr. 58). The truck was parked on an open lot in front of a trailer house at 926 Main Street in Billings. Both the truck and the trailer bore signs reading "M-R Enterprises, Inc." There was no fence or other barrier between the property and the street, and the parking lot appeared to be that of a business establishment held open to the public (Tr. 18, 20, 59, 67). The property was owned by Able Contractors, of which petitioner was president (Tr. 181). Although there was testimony that M-R Enterprises had ceased doing business at that location, nothing on the premises so indicated on the date of the seizure (Tr. 107-108, 181).

The revenue officers went to 926 Main Street and entered the trailer house, which was not locked, where they found petitioner's daughter, Ramona Reece Murray (Tr. 59, 138). The officers identified themselves and asked to see Michael Reece, who was not there, and told Ms. Murray they were there to seize the truck (Tr. 50-59, 108-109, 116). Ms. Murray thereupon telephoned petitioner (Tr. 117-118). Officer Murray gave Ms. Murray a copy of the notice of levy (Tr. 28-29), and Revenue Officer Chamberlin went outside to attach notices of seizure to the truck. While he was attaching the notices, petitioner skidded into the parking lot in his own truck, threw open the door, got out and ran toward Officer Chamberlin shouting that the officers had no right to be on the

property, and that they were not going to seize the truck belonging to M-R Enterprises. Petitioner tore a notice of seizure off the truck (Tr. 96).

Revenue Officer Murray came out of the trailer house and identified himself to petitioner, who continued to shout at the officers (Tr. 32, 33, 96-98). Petitioner told the officers that he was going to call the sheriff and returned to his own vehicle. The officers began to reattach a notice of seizure to the windshield of the truck (Tr. 32, 98, 99). Petitioner thereupon stepped out of his vehicle, tore off the notice again and said, "You guys better be gone when I get back because I'm coming back armed and then you will really be gone" (Tr. 32-35). The officers concluded that petitioner had threatened them and left the premises without the truck (Tr. 35). Petitioner admitted at trial that he knew during the confrontation that Chamberlin and Murray were Internal Revenue officers, and that they were acting in their official capacities in attempting to seize the truck belonging to M-R Enterprises (Tr. 174).

1. Petitioner first argues (Pet. 10-19) that the trial judge erred in refusing to instruct the jury that in order to convict it was required to find that petitioner "made an unequivocal, unconditional and specific expression of intent to immediately inflict injury" (Pet. 13) upon the revenue officers.[4] In his

[4] Petitioner's requested instructions do not conform to his present argument. His third requested instruction defines "threat of force" as "an avowed present determination or intent to intimidate or impede in the present or future" (Pet. 13).

view, the First Amendment requires a finding that the individual intended to make a true threat and that the absence of such an instruction permitted the jury to find him guilty merely for uttering words capable of being understood in a threatening manner.

But the statute under which petitioner was charged, 26 U.S.C. 7212(a), does not prohibit the mere making of threats, as do the provisions involved in the cases upon which petitioner relies.[5] To the contrary, Section 7212(a) punishes one who knowingly "endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity * * *." See *United States* v. *Varani*, 435 F.2d 758, 762 (6th Cir. 1970). See also *United States* v. *Johnson*, 462 F.2d 423 (3d Cir. 1972), cert. denied, 410 U.S. 937 (1973); *United States* v. *Sciolino*, 505 F.2d 586 (2d Cir. 1974). The requirement that the threat of force be knowingly made for the purpose of attempting to impede or intimidate a government officer acting in his official capacity effectively excludes from the coverage of the statute statements merely made in jest or as hyperbole.

Here, the trial court instructed the jury that the government was required to prove beyond a reasonable doubt that petitioner, "by threats of force, endeavored to intimidate and impede Internal Revenue Officers Chamberlin and Murray during their at-

[5] *Rogers* v. *United States*, 422 U.S. 35 (1975) (18 U.S.C. 871(a)); *Watts* v. *United States*, 394 U.S. 705 (1969) (18 U.S.C. 871(a)); *United States* v. *Kelner*, 534 F.2d 1020 (2d Cir.), cert. denied, 429 U.S. 1022 (1976) (18 U.S.C. 875(c)).

tempt to levy upon the pickup truck" (Tr. 209). Under this instruction, the jury could not have found petitioner guilty merely for uttering words in jest or for any other type of unintentional conduct that may have been interpreted by the jury as constituting a threatening manner. Rather, the instruction required the jury to find, and it so found, that petitioner's statement was made as an intentional attempt to intimidate or impede the officers in their official capacity.

Nor is there merit to petitioner's argument (Pet. 20-27) that Section 7212(a) is unconstitutionally vague unless it is read to prohibit only the making of a "true threat" (*id.* at 20). As we have pointed out above, the statute only proscribes knowing endeavors, by force or threats of force, to impede or intimidate government officers engaged in enforcing the internal revenue laws. The statute specifically defines threats of force as "threats of bodily harm to the officer or employee of the United States or to a member of his family." Thus, Section 7212(a) gives "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden * * *," *United States* v. *Harriss*, 347 U.S. 612, 617 (1954), and therefore complies with constitutional due process requirements.

2. Petitioner also contends (Pet. 24-27) that the government failed to show that the revenue agents were acting in their official capacities, and that "[s]ince the seizure was not shown to have been lawful, the defendant was merely exercising his right of control over his own property" (*id.* at 25). Petitioner

admitted at trial, however, that he did not own the vehicle the revenue officers were attempting to seize (Tr. 143-144). Moreover, the officers testified without contradiction that they were performing their official duties under the internal revenue laws in attempting to seize the truck (Tr. 14-18, 57-59), in accordance with their authority under 26 U.S.C. 6331. Thus, the record in this case fully supports the legality of the seizure.

At all events, there is no requirement that the government establish the legality of the seizure in order to sustain a conviction for a violation of Section 7212(a). Concededly, some of the cases relied upon by petitioner suggest that the lawfulness of the seizure must be shown.[6] But the statute only requires that the officers be acting in an official capacity, and the more recent authorities quite clearly indicate that the lawfulness of the seizure need not be established. See *United States* v. *Harris*, 521 F. 2d 1089, 1092 (7th Cir. 1975); *United States* v. *Oliver*, 421 F. 2d 1034, 1036-1037 (10th Cir. 1970); *United States* v. *Scolnick*, 392 F. 2d 320, 326 (3d Cir.), cert. denied, 392 U.S. 931 (1968). As the Seventh Circuit noted in *United States* v. *Harris*, *supra*, 521 F.2d at 1092, "[i]f the rule were otherwise it would 'en-

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[6] *Cooper* v. *United States*, 299 F. 483 (3d Cir. 1924); *United States* v. *Dentice*, 289 F. Supp. 799 (E.D. Wis. 1968). Petitioner's reliance (Pet. 25) on *United States* v. *Heck*, 499 F.2d 778 (9th Cir. 1974), is misplaced. There, the Ninth Circuit specifically declined to pass on the question (499 F.2d at 783-784).

courage violent self-help where civil remedies are admittedly available.' " [7]

3. Finally, petitioner contends (Pet. 31-44) that the trial court erred in granting the government's motion *in limine* to exclude evidence regarding a prior seizure (the so-called "TBM" seizure) that petitioner believed to have been unlawful. But the trial court acted within its discretion in excluding evidence of the earlier seizure because it was irrelevant to the questions in issue here and could have been prejudicial to the government and confusing to the jury. Fed. R. Evid. 401, 402 and 403. Moreover, contrary to petitioner's claim, the court's ruling on the motion *in limine* did not preclude him from cross-examining the officers concerning his prior encounter with them in an attempt to show bias or prejudice on their part. As the court of appeals

[7] Petitioner also claims (Pet. 27) that the officers were required to obtain a search warrant before entering the parking lot to seize the vehicle. But as the decision below correctly recognized (Pet. App. A), this Court held in *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338 (1977), that no search warrant was necessary to levy upon and seize property located, as in this case, on an open lot.

Petitioner further contends (Pet. 28-31) that the officers were required under Treasury Regulations on Procedure and Administration § 301.6331-1(a) (26 C.F.R.), to serve a notice of levy upon him, as a third party in possession of the truck, prior to seizure. The record, however, shows that petitioner had no interest in the truck and was not in possession of it at the time of the seizure. Rather, it belonged to the delinquent taxpayer, M-R Enterprises, and was parked on an open lot (Tr. 17-18, 20, 59, 67, 174). A copy of the notice was served upon Ms. Murray, who was the only other person on the premises at the time (Tr. 28-29).

noted (Pet. App. A), the trial court allowed petitioner's counsel to elicit testimony from Revenue Officer Chamberlin that petitioner previously had ordered Chamberlin out of an office petitioner maintained at 815 Main Street (Tr. 81). Thus, petitioner was not prevented from attacking Chamberlin's credibility.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

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